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No. 99-1379

In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE TEXAS EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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32pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE ... 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

A. The Ninth Circuit's Construction of "Transaction" In Section 2 Conflicts with the Language of the FAA As a Whole 3

B. The *Craft* Court's Construction of "Involving Commerce" Conflicts with This Court's Previous Determination of Congressional Intent..... 6

C. The Meaning of the Section 1 Exclusion Is Discernible From the Plain Language of the Statute .. 9

D. The "Legislative History" of the FAA Reveals Little (If Anything) of Congressional Intent Regarding the Section 1 Exclusion, and Provides No Basis for the *Craft* Court's Disregard of the Plain Language of the Statute 12

E. The FAA's Legislative History, and This Court's Opinion in *Allied-Bruce Terminix,* Establish That the Enforcement of Agreements to Arbitrate Employment Disputes Is Consistent With the Fundamental Objective of the Act: The Endorsement and Encouragement of Alternate Dispute Mechanisms Whose Efficiency and Economy Benefit National Commerce..... 15

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Alcaraz v. Avnet, Inc., 933 F. Supp. 1025 (D.N.M.1996) 23

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834 (1995) 7, 8, 9, 11, 15

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 11

Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999) 3, 21, 26

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) 11, 23

Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999) ..... *passim*

DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997) 24

Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) 11

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998) 21

Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) 11

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991) 18

Graham Oil v. Arco Prods. Co., 43 F.3d 1244 (9th Cir. 1994) 23

Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997) 11

TABLE OF AUTHORITIES – Continued

Page

Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 115 S.Ct. 1061 (1995) 10

Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 23

Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir. 1999) 11

McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998) 11

Norfolk & Western v. Am. Train Dispatchers, 499 U.S. 117, 111 S.Ct. 1156 (1991) 11

O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) 11

Paladino v. Avnet Computer Technologies, 134 F.3d 1054 (11th Cir. 1998) 11, 22

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 11

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967) 17

Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) 10

Shankle v. B-G Maint. Mgmt. of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999) 24

Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852 (1984) 17

United States v. Alaska, 521 U.S. 1, 117 S.Ct. 1888 (1997) 5

TABLE OF AUTHORITIES – Continued

Page

United Steelworkers of Am. v. American Mfg Co., 363 U.S. 564, 80 S.Ct. 1343 (1960) 18

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960) 18

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960) 18, 22

STATE CASES

Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, *modified*, 16 Cal. 4th 283 (1997) 24

Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) 23

In re Turner Bros. Trucking Co., 8 S.W.2d 370 (Tex. App. – Texarkana 1999) 24

FEDERAL STATUTES

9 U.S.C. § 1 .....5, 10

9 U.S.C. § 2 17

42 U.S.C. § 1981 20

42 U.S.C. § 12212 20

LEGISLATIVE HISTORY

Report of the Subcmte of the Sen. Comte. on the Judiciary, 67th Cong., 4th Sess. (1923) 12, 13, 16

Report of the Subcmte of the Jt. Comte. on the Judiciary, 68th Cong., 1st Sess. (1924) 14

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Maltby, Lewis L., *The Projected Impact of the Model Employment Termination Act*, 536 Annals of the American Academy of Political and Social Science (1994) 20

New York State Bar Journal, Vol. 71, No. 7 (September/October 1999) 19

Spelfogel, Evan J., A Focus on Fairness, Due Process, in ADR, *National Law Journal*, Aug. 9, 1999 25

U.S. Department of Labor and Commerce, *Commission on the Future of Worker-Management Relations, Fact Finding Report* (May 1994) 20

U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* (August 1997) 19

U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employees Use Alternative Dispute Resolution* (1995) 19

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Texas Employment Law Council ("TELC") is a voluntary, non-profit association organized to promote the common interests of employers and the general public in well-reasoned laws affecting private sector employer operations. TELC is incorporated under Texas law and is not affiliated with any other business association, except that its membership consists of employers doing business in Texas. Organized in 1984, TELC has approximately 35 members representing a diverse group of industries throughout Texas. These include, among others, refining and petrochemical, manufacturing, engineering and construction, insurance, financial services, communications, high-tech, forest products, and publishing. TELC's member companies range in size up to more than 50,000 domestic employees. Its governing body is a board of directors composed of professionals in the fields of human resources management and employment law. This combined experience gives the Council a depth of understanding of the practical and legal considerations relevant to the development of employment-related laws.

The majority of TELC's members are substantial-sized companies with large numbers of employees. As such, they are frequently required to defend against claims by current or former employees. Several TELC

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[1] The consent of all parties to the filing of this brief is on file with the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

members have developed employee dispute resolution programs that include agreements to submit claims that cannot be resolved informally to arbitration. These employers typically rely on the FAA when necessary to seek judicial enforcement of those agreements. A holding by this Court that the Federal Arbitration Act does not cover arbitration provisions in employment contracts would effectively abrogate these dispute resolution programs, which have become an evolving model in Texas (and the rest of the United States) for resolving common workplace disputes that otherwise drain inordinate resources from both the private economy and the judiciary. This, in turn, would increase the cost of doing business in Texas (and elsewhere) and limit employers' latitude to effectively and efficiently manage their operations and work forces. TELC urges this Court to reject the Ninth Circuit's view on this issue and find in favor of Petitioner. For these reasons, Texas Employment Law Council, as Amicus Curiae, respectfully submits this brief for consideration with regard to these important issues.

SUMMARY OF THE ARGUMENT

Founded upon its previous ruling in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*), the Ninth Circuit's decision in the instant case misconstrued the plain meaning of specific terms of the Federal Arbitration Act ("FAA" or "the Act"), attributed an implied meaning to such terms that conflicts with other provisions of the statute and with this Court's prior holdings, and, ultimately, frustrated the legislative intent to extend the scope of the FAA consistent with the most expansive

application of Congress' power to regulate commerce. In rejecting the plain meaning of the exclusionary language in section 1 of the Act, the Ninth Circuit relied instead on a legislative history that, in reality, offers virtually no guidance as to the specific purposes of such language. As a result, the court delivered an opinion that distorts the express language of the Act itself, conflicts with settled principles previously established by this Court, and frustrates the Act's primary purpose: the encouragement of alternate dispute mechanisms that benefit national commerce.

ARGUMENT

In *Circuit City Stores, Inc. v. Adams*, the Ninth Circuit erroneously concluded that the Federal Arbitration Act "does not apply to labor or employment contracts." 194 F.3d 1070, 1070 (9th Cir. 1999) (*per curiam*). The court reached this conclusion without independent analysis, instead relying on, and adopting, its earlier holding in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*). Accordingly, the following brief addresses the Ninth Circuit's holding in *Craft* and the reasons why that decision was incorrect.

A. The Ninth Circuit's Construction of "Transaction" In Section 2 Conflicts with the Language of the FAA As a Whole.

The Ninth Circuit's holding in *Craft* depends entirely on two underlying conclusions regarding the scope and intent of section 2 of the FAA. The first is that section 2,

on its face, appears not to encompass any kind of employment agreement because such arrangements do not fall within the dictionary definition – as of 1925 – of the term "transaction." The second is that the construction of section 2, insofar as it relates to coverage of the Act, is confined to the meaning of "involving [interstate] commerce" as of 1925. Both premises are faulty. The first rests on an overly restrictive reading of "transaction" which does not comport with its plain meaning. The second disregards this Court's controlling precedent.

Initially, the appeals court concluded that employment contracts did not fall within the definition of "transaction" – *i. e.*, "a business deal; an act involving buying and selling." 177 F.3d at 1085. This seems plainly wrong since employment relationships, at their essence, are contracts for the "buying and selling" of labor for the purpose of furthering some commercial enterprise. Thus, they must qualify as "business deals" or "transactions." This was as true in 1925 as it is today.

Additionally, the Ninth Circuit's premise – that "transaction" as used in section 2 did not include employment relationships – is inconsistent, ironically, with the same court's own insistence that, "[w]hen interpreting a statute, [a] court looks first to the words that Congress used . . . [and] rather than focusing just on the word or phrase at issue, . . . looks to the entire statute to determine Congressional intent." *Id.* at 1084-85, citing *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). In fact, had the court followed its own instruction, it would have reached the opposite conclusion regarding whether employment relationships can be "transactions"

under section 2. Specifically, in section 1, Congress expressly stated

> . . . but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. Clearly, this provision indicates that Congress understood that "transaction," as used in section 2 of the Act, could encompass an employment relationship. Otherwise, it had no reason to expressly exclude these, or any other, employment contracts from the application of the Act.[2] Stated another way, if Congress had not contemplated that the term "transaction" could encompass employment relationships, the exclusionary language in section 1 would have been unnecessary or superfluous. It is well settled that, if at all possible, a statute shall not be construed so as to render any of its provisions superfluous. *United States v. Alaska*, 521 U.S. 1, 59, 117 S.Ct. 1888, 1918 (1997). The *Craft* court's hypothesizing that "transaction" does not encompass employment relationships does precisely that, speculating that it was not

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[2] The argument might be raised that the "nothing herein" language refers to section 1 only, and indicates that Congress was in fact saying that no contracts of employment were to be considered "commerce" pursuant to the definition of that term earlier in section 1. Such a view would conflict with Congress' own characterization of the meaning of the exclusionary provision. When the Act was recodified in 1947, Congress clarified section 1 by adding its current caption: " 'Maritime transactions' and 'commerce' defined; *exceptions to operations of title.*" (emphasis added) Therefore, the exclusion cannot be read apart from the coverage provisions in section 2.

contemplated that section 2 might cover, as a "transaction," a particular kind of contractual relationship with regard to which, elsewhere in the statute, Congress was careful to carve specific and particular exceptions.

Thus, had the *Craft* court followed the fundamental rules of statutory construction which it articulated, it would have determined, in its threshold analysis of whether the Act encompasses written arbitration agreements in employment contracts involving commerce, that the most logical conclusion – based on section 1's express exclusion of certain varieties of such contracts – was that such contracts are covered. Having done so, it would then have turned its attention to section 1 to determine what, if any, limitations or restrictions Congress intended to place on the universe of otherwise-covered "transactions."

B. The *Craft* Court's Construction of "Involving Commerce" Conflicts with This Court's Previous Determination of Congressional Intent.

The *Craft* court also went to considerable lengths to conclude that the word "commerce," as employed by Congress in the 1920's, was extremely limited – applicable, essentially, only to the actual movement of goods or persons among the states. *Craft*, 177 F.3d at 1086. Consequently, the court reasoned, even if Congress had any inkling that an employment relationship could constitute a "transaction" under section 2, it intended that only those employment relationships involving the actual interstate movement of goods or persons would qualify as "transactions involving commerce." Thus, in *Craft's* view, the only employment contracts that might arguably be within Congress' power to regulate were those that it

expressly excluded, in section 1, from the scope of the Act. *Id.*

This narrow construction of "involving commerce" as used in section 2 has been implicitly rejected by this Court. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995), this Court held that use of the phrase "involving commerce" in section 2 signaled Congress' intention to extend the FAA's coverage to the fullest extent of its power to regulate interstate commerce. Consequently, contracts "involve" interstate commerce, under section 2, if they merely "affect" commerce – *i.e.*, such contracts are not limited only to those that encompass activities actually within the flow of commerce. *Allied-Bruce Terminix*, 513 U.S. at 273. Congress used the phrase "involving commerce" to indicate its intent not to limit "commerce" to whatever it was deemed to encompass at any particular time, but to allow the Act's coverage to expand as Congress' own power to regulate commerce might develop and expand. *Id.* at 275.

Indeed, if the FAA's legislative history casts light on any pertinent point, it is that Congress intended the Act to reflect its power over interstate commerce to its fullest extent. As Julius Henry Cohen, a prominent member of the American Bar Association and the general counsel for the New York Chamber of Commerce, informed the Subcommittee of the Joint Committee of the Judiciary in 1924:

> It is not only the actual and physical interstate shipment of goods which is subject to the interstate commerce powers of the Federal Government, but these powers govern every agency or act which bears so close a relationship to interstate commerce that they can reasonably be said

> to affect it. Contracts relating to commerce are within the regulatory powers of Congress.[3]

Jt. Hearings of the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st session (1924) 38.

The *Craft* court disposed of *Allied-Bruce Terminix* – and the reliance on it by other circuits that have construed the section 1 exclusion narrowly – by implying that this Court's construction of "involving commerce" did not impact the definition of "transaction." *Craft*, 177 F.3d at 1093. In other words, if employment agreements cannot be transactions under section 2, one need not embark on a construction of "involving commerce" that conflicts directly with this Court's ruling in *Terminix*. As discussed above, however, any ambiguity regarding whether "transaction" encompasses employment relationships is resolved by the Act itself, in its express exclusion in section 1 of only limited types of employment relationships. Thus, the Act covers written arbitration provisions in contracts "evidencing," or related to,[4] an employment relationship that affects commerce, subject to Congress' specific limitation of that universe of coverage in section 1.

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[3] Obviously, this statement by Cohen, presumably someone well versed in the contemporary understanding of "commerce" subject to regulation by Congress, undercuts the *Craft* court's hypothesis that "commerce" was limited *only* to the actual movement of goods or people across state lines.

[4] This Court clarified in *Allied-Bruce Terminix* that "evidencing" as employed in section 2 means, essentially, that the contract in question must be related to a transaction involving commerce. 513 U.S. at 279.

The *Craft* court's analysis also errs in that it freezes the scope and meaning of the FAA as of 1925. *Allied-Bruce Terminix* instructs that section 2 was intended to accommodate an expansive view of transactions "involving commerce," consistent with the fullest extent to which Congress' power to regulate interstate commerce might be construed. Consequently, the *Craft* court's focus on what might have been the scope of "commerce" in 1925, as a means of narrowing the scope of section 2, is misguided. As *Allied-Bruce Terminix* makes clear, section 2 is not static, but is tied to Congress' authority to regulate commerce. Thus, the breadth of section 2's coverage provision is restricted only by the narrow exclusion articulated in section 1 and not by the long outdated view of interstate commerce that existed in 1925.

C. The Meaning of the Section 1 Exclusion Is Discernible From the Plain Language of the Statute.

It was both unnecessary and erroneous for the *Craft* court to have embarked on a survey of the commonly held view of "commerce" in 1925, or an examination of the FAA's legislative history, in its inquiry as to whether the Act excludes from its coverage all contracts of employment. Rather, well settled rules of statutory construction provide sufficient guidance for interpretation of the exclusionary language in section 1.

First of all, it is presumed that the exclusionary language has some purpose that is not served equally well or better by another provision of the Act; that is, no statutory provision will be assumed to be superfluous or

merely redundant of another. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 115 S.Ct. 1061, 1069 (1995). Therefore, just as it would have been unnecessary to have expressly excluded certain kinds of employment contracts from the application of the statute if employment relationships in general were not "transactions," it would have been equally unnecessary to specify the particular kinds of employment contracts to which the Act is inapplicable if, in fact, *all* employment contracts were to be excluded. In other words, if Congress had intended to exclude all employment contracts from the scope of the FAA, it need only have said, "[N]othing herein shall apply to contracts of employment."

It did not, however. Instead, it qualified "contracts of employment" with the phrase, "of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The circuits that have addressed this issue, except for the Ninth, have correctly appreciated that the qualifying phrase must have both purpose and meaning, and that its purpose must be to limit the universe of "contracts of employment" falling within the exclusion from coverage. *See, e.g., Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("[i]t is quite impossible to apply a broad meaning to the term 'commerce' in section 1 and not rob the rest of the exclusionary clause of all significance") (internal citations omitted).

The meaning of the qualifying language is equally discernible. First, its literal wording reflects that it concerns only those employees who are "engaged in foreign or interstate commerce." In that respect, the language is at least as restrictive as the often-found words of art "in

commerce," which this Court has explained refers to "persons or activities within the flow of interstate commerce." *Allied-Bruce Terminix*, 513 U.S. at 273. Moreover, because the general category of "any other class of workers" follows the specifically listed "seamen" and "railroad employees," application of the principle of statutory construction known as *ejusdem generis* establishes that such "other class of workers" is limited to categories of employees whose work, like that of seamen and railroad employees, actually involves the movement of goods or persons in foreign or interstate commerce. *Norfolk & Western v. Am. Train Dispatchers*, 499 U.S. 117, 129, 111 S.Ct. 1156, 1163 (1991).

Thus, application of standard rules of statutory construction to the plain language of sections 1 and 2 leads inexorably to the conclusion that the FAA encompasses employment relationships that affect commerce, except for those limited categories of employees who are directly engaged in the movement of people or goods in interstate commerce.[5]

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[5] This is the conclusion of all the circuits that have addressed this issue, with the exception of the Ninth. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir. 1999); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

D. The "Legislative History" of the FAA Reveals Little (If Anything) of Congressional Intent Regarding the Section 1 Exclusion, and Provides No Basis for the *Craft* Court's Disregard of the Plain Language of the Statute.

Having disregarded the plain language of the statute, the Ninth Circuit compounded its error in *Craft* by attempting to glean the statute's purposes from its legislative history. It is difficult to imagine a more daunting, or less productive, enterprise. The legislation that would eventually become the FAA was originally introduced in Congress in 1922, as Senate Bill S. 4214 and identical House Bill H.R. 13522. On January 31, 1923, a ninety minute hearing was held before the Senate Subcommittee of the Committee on the Judiciary, which consisted of three senators. Appearing before the Subcommittee were three witnesses, one representing the New York Chamber of Commerce, the others both from the American Bar Association.[6]

The first witness did not address any issue related to whether employment contracts would be implicated in any way by the proposed legislation – nor did any of the Senators raise such an issue – concentrating much of his testimony on the excessive and rising costs of litigation to all businesses, and the beneficent effects an act enforcing arbitration agreements could be expected to have on such costs. *Report of the Subcmte of the Sen. Cmte. on the Judiciary*, 67th Cong., 4th Sess. 1-7 (1923). The second, W. H. H. Piatt of the ABA, spoke primarily of the legal and judicial procedural implications of the bill, and noted that the two

[6] The ABA had written the bill.

principal lines of argument against the bill had been the concerns that it would improperly usurp judicial prerogatives and that it would create a professional arbitrator class and take jobs from lawyers. *Id.* at 8.

During his presentation, however, Piatt brought to the subcommittee's attention an objection to the bill by the head of the seamen's union, who apparently had expressed concern that the bill would require members of his union to enter into, and abide by, contracts with arbitration provisions. *Id.* at 9. Piatt informed the subcommittee that it had not been the ABA's intention to craft an act "referring to labor disputes." He added, that if that was a concern, language could be added to the bill making it inapplicable "to seamen or any class of workers in interstate or foreign commerce." *Id.* at 9. Piatt's raising of the seamen's point, and his suggested method of circumventing their concern, evoked no comment from any member of the subcommittee. Instead, the discussion turned immediately to other issues, although a later reference was made by subcommittee chairman Sterling to Piatt's "suggested amendment in regard to the labor associations." *Report of the Subcmte of the Sen. Cmte. on the Judiciary*, 67th Cong., 4th Sess. 9-10 (1923).

The final witness did not address any issue related to employment contracts at all, and no Senator raised such issues. Included in the documentary materials submitted to the subcommittee was a letter from Secretary of Commerce Herbert Hoover who proposed that concerns such as the seamen's could be alleviated by addition of the exact exclusionary language that was ultimately included in Section 1. *Report of the Subcmte of the Sen. Cmte. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923).

The Sixty-Seventh Congress subsequently adjourned without taking any action on the arbitration bills. Neither the Senate nor the House Bill was reported out of committee, and there is no other recorded history concerning them. In the first session of the Sixty-Eighth Congress, however, in January 1924, the arbitration bills resurfaced as Senate Bill S. 1005 and House Bill H.R. 646. A Joint Committee of Subcommittees on the Judiciary began hearings on the bills on January 9, 1924. The bills included the language suggested by Secretary Hoover in his previous letter, and such language was neither changed thereafter nor discussed in any recorded hearing or debate regarding the bills. Indeed, the only mention of any issue regarding the inclusion or exclusion of contracts of employment was the resubmission of Secretary Hoover's letter with its suggested, and now incorporated, language for excluding contracts of employment of "seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Report of the Subcmte of the Jt. Cmte. on the Judiciary*, 68th Cong., 1st Sess. 12 (1924).

Thus, by the time the bill was passed by Congress and signed by the President, the question of its applicability to employment contracts had been raised on but one occasion, by the head of the seamen's union and on behalf of his constituency, whose concern was voiced, second-hand, by one of three witnesses before a three-senator subcommittee. There is no record of any of the three senators' views on this issue, or of the views of any of their ninety-three fellow senators, or of any of their counterparts in the House of Representatives. Similarly, in the next session of Congress, in which the FAA was

actually passed, there is no record of any member's view on this issue. To draw any conclusion about Congressional intent regarding employment contracts generally from this record would approach clairvoyance; to have done so in conflict with the plain language of sections 1 and 2, and via an analysis that conflicts with this Court's prior construction of "involving commerce," constituted substantial error.[7]

E. The FAA's Legislative History, and This Court's Opinion in *Allied-Bruce Terminix*, Establish That the Enforcement of Agreements to Arbitrate Employment Disputes Is Consistent With the Fundamental Objective of the Act: The Endorsement and Encouragement of Alternate Dispute Mechanisms Whose Efficiency and Economy Benefit National Commerce.

Although the FAA's legislative history provides no clear guidance as to Congressional intentions with respect to employment contracts – certainly nothing to warrant disregard of the plain language of sections 1 and 2 and this Court's conclusions as to Congress' intent to extend the Act's coverage to the limits of interstate commerce – such history does illuminate the fundamental

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[7] Indeed, one could reasonably infer from the political sensitivities at the time regarding transportation workers, such as seamen and railroad employees, that the exclusionary language added to § 1 was for the limited purpose of appeasing this narrow interest group, rather than for the purpose of excluding all employment agreements. *See Craft*, 177 F.3d at 1092.

objective of the Act, an objective consistent with its application to most employment situations. The sentiment supporting the enforcement of arbitration agreements originated from a consensus that American commerce would benefit surely and directly from the nurturing and encouragement of a prompt and cost efficient alternative to judicial litigation. Witnesses impressed this concern upon Congress, emphasizing that the bill would "eliminate friction, delay, and waste . . . [and] reduce the price of commodities to the consumer."

> If inexpensive but dependable arbitration were possible instead of costly, time-consuming, and troublesome litigation, the risk [of claims, fault-finding, and disputes] would be correspondingly smaller and the price [of commerce] made to conform therewith. . . .
>
> The merchants want this very badly. It adds to the cost to the consumer if the merchant has in the calculation of his prices to consider, in his overhead, possible litigation, possible claims. All of these expenses go into the overhead running expenses of the business. No matter how little it is, it will have the result of reducing the cost, without taking it out of the purchaser or anybody.

Report of the Subcmte of the Sen. Cmte. on the Judiciary, 67th Cong., 4th Sess. 3-7 (1923).

This Court, and others, have noted that the FAA was enacted as a response to the significant barriers, erected by state courts and legislatures, to the use of arbitration as an alternative means of dispute resolution. Through the FAA, Congress sought to protect the legitimate expectations of parties to contracts that their election to resolve

disputes through arbitration would be honored by the courts.[8] Thus, Congress provided, in section 2 of the Act, that arbitration agreements evidencing an interstate transaction are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Underlying Congress' desire that arbitration agreements be enforced was the fundamental premise that doing so would directly benefit the conduct and flow of interstate commerce. This is the Congressional objective implicitly acknowledged and furthered by this Court in *Allied-Bruce Terminix*, expressed in its conclusion that Congress intended the FAA to encompass "commerce" to the fullest extent of Congressional power to do so. Indeed, in recent years, businesses of all types have increasingly embraced the efficiency and economy of arbitration as a mechanism of dispute resolution in various contractual contexts. In so doing, such businesses rely on the FAA for the enforcement of arbitration agreements that have both the objective and the result of rationalizing and facilitating the conduct of interstate commerce, the same beneficent effects sought by the Act's creators.

Viewed as a continuum, the enactment of the FAA, this Court's endorsement in the "*Steelworkers* Trilogy" of arbitration as a legitimate and preferred method for

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[8] *Southland Corp. v. Keating*, 465 U.S. 1, 11-14, 104 S.Ct. 852 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801 (1967); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

resolving employment disputes in the context of represented work forces,[9] and, more recently, this Court's approval of arbitration of employment discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*,[10] have increasingly encouraged employers to rely on arbitration as a process for resolving the routine and recurring disputes that are the inevitable consequence of the employment relationship.

Thus, while the use of arbitration as a means of resolving employment disputes was not widespread when the FAA was passed, employers and employees have since embraced arbitration as a fair and efficient alternative to the traditional, but more expensive and time-consuming, judicial forum. In 1979, the Bureau of National Affairs determined that fewer than 1% of employers relied on arbitration for the resolution of

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[9] *See United Steelworkers of Am. v. American Mfg Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

[10] In *Gilmer*, 500 U.S. 20, 32-33, 111 S.Ct. 1647, 1654-55 (1991), this Court explicitly endorsed the use of arbitration in the context of employment discrimination claims. In so doing, this Court rejected the numerous challenges raised to the fitness of the arbitration process for resolving such claims. The Court found such attacks on arbitration "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30, 111 S.Ct. at 1654 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc. v. McMahon*, 490 U.S. 477, 481, 109 S.Ct. 1917, 1920 (1989)).

employment disputes. Bureau of National Affairs, Policies for Unorganized Employees (PPF Survey, No. 125, 1979). Fifteen years later, the General Accounting Office found that 10% of U.S. employers were using arbitration, and nearly that same percentage again was evaluating the potential benefits of doing so. U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employees Use Alternative Dispute Resolution* (1995) at 7. A follow-up survey by the GAO, two years later, found that 19% of employers surveyed had implemented some form of arbitration. U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* (August 1997) at 2.

The increased reliance on arbitration as a method of resolving employment related disputes has occurred simultaneously with the sharp rise in employment discrimination complaints in the 1990's. In the private sector, the number of discrimination complaints filed with the EEOC increased by 43 per cent between fiscal 1991 and 1994, a development that prompted many employers to seek alternative means of resolving employee disputes.[11] U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* (August 1997), p. 9. Such figures do not include the plethora of non-discriminatory wrongful discharge and employment tort claims in judicial litigation, which the

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[11] Twenty-five times more employment discrimination lawsuits were filed in 1998 than in 1970, an increase nearly double that of all other types of civil litigation combined. *New York State Bar Journal*, Vol. 71, No. 7 (September/October 1999), 20.

government has estimated are filed at the rate of approximately 10,000 per year and which, obviously, place additional strain on the efficient conduct of commerce. U.S. Department of Labor and Commerce, *Commission on the Future of Worker-Management Relations, Fact Finding Report* (May 1994) at 112-13.

The same need for consistency in the enforcement of arbitration agreements that led to Congress' passage of the FAA, and the advantages of arbitration, oft cited by this Court, such as its expediency, informality, and reduced cost,[12] are equally, if not more, applicable in the employment context as in that of any other contractual relationship.[13]

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[12] In 1994, the estimated average defense costs associated with judicial litigation of wrongful discharge claims was $124,000. *See* Lewis L. Maltby, *The Projected Impact of the Model Employment Termination Act*, 536 Annals of the American Academy of Political and Social Science, 107 (1994).

[13] Congress explicitly acknowledged the viability of arbitration to resolve employment claims, and implicitly endorsed a narrow construction of the section 1 exclusion, in the Civil Rights Act of 1991 and the Americans With Disabilities Act of 1990. Both statutes provide:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title.

Pub.L. 102-166, § 118, reprinted in notes to 42 U.S.C. § 1981; 42 U.S.C. § 12212.

While there is some disagreement about whether this provision was intended to authorize pre-dispute arbitration agreements, there is no dispute that, at a minimum, this provision signaled Congressional intent to encourage the use of

The increase in the number of employment disputes is no more than an inevitable consequence of the modern workplace. The percentage of the workforce covered by collective bargaining agreements continues to decline, leading to fewer and fewer employees whose employment is regulated by such agreements. In addition, the overwhelming majority of the fifty states adhere to the view that employment is at-will, a doctrine that permits an employer to discharge its employees for any lawful reason, even where the reason is arbitrary or unfair, thus producing frequent, but often groundless, litigation. In contrast to large commercial disputes where the cost of litigation, though high, is but a fraction of the amount in controversy, and where time involved in litigating the dispute may be immaterial given the significance of the outcome to the enterprise, employment disputes are commonly routine matters that reoccur with ratable frequency, involve litigation costs that oftentimes exceed any probable recovery by the employee, and may take longer to make their way through the court system than the employment relationship itself lasts.

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post-dispute agreements to arbitrate. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1194 (9th Cir. 1998) (construing this provision to encourage agreement to arbitrate after the dispute arises). Presumably, then, when Congress wrote these statutes, it did so with the belief that the FAA provided for the enforcement of arbitration agreements between an employer and employee, at least in some context. Otherwise, the parties would be left to the inconsistencies of the statutory and common law of the 50 states in seeking enforcement of such agreements. Yet, Ninth Circuit holdings in *Adams* and *Craft* are inconsistent with expressed Congressional desire to promote the use of arbitration in the employment arena.

It is this recognition of the benefits of arbitration in the employment context that led to the establishment of a body of federal substantive law designed specifically to ensure that courts would enforce arbitration agreements between employers and their unionized work forces. *See Warrior & Gulf Navigation Co.*, 363 U.S. at 581. Similarly, the use of arbitration to address employment disputes in the non-unionized sector equally fulfills the FAA's legislative goal of benefitting commerce by facilitating the expeditious resolution of disputes.

Increase in the use of arbitration to resolve employment claims has not come at the expense of the procedural or substantive rights of employees. Notwithstanding the strident attacks on the adequacy of arbitration in deciding employment disputes, the judiciary has been vigilant in ensuring that agreements to arbitrate between employers and employees are given no greater deference than any other contract. Thus, where arbitration agreements are substantively or procedurally unconscionable, or procured through overreaching, fraud, or duress, courts have, pursuant to section 2 of the FAA, refused to enforce such agreements.

The Eleventh Circuit's decision in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), typifies the gatekeeping function assumed by courts in evaluating the enforceability of arbitration agreements. In *Paladino*, the plaintiff signed an agreement that provided for the arbitration of all claims arising from his employment or termination of employment. *Id.* at 1056. The agreement further provided that the arbitrator could only

award breach of contract damages. *Id.* The court concluded that the agreement did not encompass the plaintiff's Title VII claim in light of the agreement's exclusion of damages that would be recoverable under Title VII. *Id.* at 1058. Courts have likewise found that other similar substantive limitations or restrictions on employees' rights, including the limitation or exclusion of damages and the abridgment of statutes of limitation, are unconscionable under traditional principles of contract law. *E.g., Graham Oil v. Arco Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir.1994); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025 (D.N.M.1996); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997).

Even where the arbitration agreement places no limitations on substantive rights and remedies, courts scrutinize the agreement to ensure that the employer has not imposed any procedural roadblocks that might, nonetheless, support a finding of unconscionability. The Fourth Circuit, for example, recently refused to uphold an arbitration contract that imposed rules for arbitration that were deemed one-sided and unfair. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939-40 (4th Cir. 1999). Notably, despite holding the agreement unenforceable, the Fourth Circuit emphasized its commitment to upholding the liberal federal policy in favor of arbitration. *Id.* at 941 (noting that "[t]o uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution").

Similarly, in *Cole v. Burns Int'l Securities Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), Judge Edwards, writing for the court, enforced an agreement to arbitrate between an

employee and his former employer but established certain "minimum standards" where the agreement to arbitrate was a condition of employment. These standards included the requirement of a neutral arbitrator with knowledge of the substantive area of law, the right to reasonable discovery, an affordable process, the right to counsel, and the right to a written opinion explaining the decision. *Id.* at 1482-83, 1485 & n.11. *See also, Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (refusing to enforce an agreement that required the plaintiff, a janitor, to pay one-half the costs of the arbitration proceeding); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459 (S.D.N.Y. 1997) (concluding that a clause in an arbitration agreement purporting to preclude an award of attorneys fees to a prevailing party was void as against public policy).

Finally, courts consistently rely on fundamental principles of contract law to ensure that the formation of the arbitration agreement does not violate basic prohibitions against the use of duress, coercion, and fraud. *See, e.g., In re Turner Bros. Trucking Co.*, 8 S.W.2d 370, 373 (Tex. App. – Texarkana 1999) (holding an arbitration agreement invalid where the employee who signed the agreement was functionally illiterate and the employer's representatives who presented the agreement did not explain to the employee what he was signing); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 981, 64 Cal. Rptr. 2d 843, *modified*, 16 Cal.4th 283 (1997) (holding that plaintiff's claim of fraudulent inducement was supported by evidence that Kaiser (the plaintiff's health plan) "misrepresented the speed of its arbitration program, a misrepresentation on which [the plaintiff's employer]

relied by selecting Kaiser's health plan for its employees. . . . ").[14]

Arbitration has matured since the enactment of the FAA. Today, employers and employees alike rely on the process as a mechanism for fairly and efficiently resolving work related claims. The arbitral forum provides a means for full vindication of statutory and common law rights balanced with the laudable goal of expediting dispute resolution while reducing its cost. Congress' objectives in passing the statute have been furthered by this evolutionary growth of arbitration as an alternative to lawsuits. Adoption of the restrictive construction of the FAA in *Craft* would effectively deprive employers and their employees of the significant benefits that have been gained through the widespread adoption of arbitration programs in the workplace. This, in turn, would defeat,

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[14] In addition to these judicial safeguards, the organizations most frequently called upon to administer the arbitration process have a heightened sensitivity to ensuring that employment claims are resolved in accordance with basic notions of due process. For example, in 1995, the Taskforce on Alternative Dispute Resolution in Employment, consisting of members from such groups as the American Arbitration Association, the Federal Mediation and Conciliation Services, the National Employment Lawyers Association, the National Academy of Arbitrators, and the Labor and Employment Law Section of the ABA, developed a protocol for use in the employment dispute setting calling for fundamental due process safeguards, fair and appropriate discovery, the right of representation by counsel, and the selection of a neutral arbitrator who is authorized to grant all remedies that would be available in court. Evan J. Spelfogel, A Focus on Fairness, Due Process, in ADR, *National Law Journal*, Aug. 9, 1999 at B10.

rather than promote, the objectives Congress had in mind when it enacted the FAA.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision in *Adams* should be reversed.

Respectfully submitted,

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18